APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2806

UNITED STATES OF AMERICA ex rel. GERALD SCARPELLI,
Petitioner-Appellee,

v.

RICHARD GEORGE,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 C 864—Susan Getzendanner, *Judge.*

Argued May 28, 1982—Decided August 26, 1982

Before BAUER, WOOD, and COFFEY, *Circuit Judges.*

BAUER, *Circuit Judge.* This appeal raises the issue of whether the state trial court's failure to permit a defendant to cross-examine a crucial witness concerning his trustworthiness and reliability is, as a matter of law, harmful error. The district court held that it was. We reverse.

Petitioner-appellee Gerald Scarpelli was convicted of auto theft and possession of burglary tools in the Circuit Court of DuPage County, Illinois. He appealed, claiming, among other errors, that he was denied a fair trial

because the trial judge had unduly restricted his cross-examination of the state's chief witness, Officer Culen. The trial court sustained objections to questions relating to Culen's credibility, his trial preparation, and his identification of Scarpelli. The state appellate court found no error with respect to the restrictions concerning Culen's credibility or trial preparation and held that the restriction relating to Culen's identification of Scarpelli, while improper, was harmless error. The Illinois Supreme Court and the United States Supreme Court, in turn, denied certiorari.

Scarpelli then petitioned the district court for a writ of habeas corpus. The district court granted his petition. It agreed with the state appellate court that restricting Scarpelli's cross-examination of Culen was improper. The district court, however, held that the harmless error rule did not apply and that the trial court's failure to permit Scarpelli to cross-examine Culen concerning the reliability of Culen's identification testimony denied Scarpelli his sixth amendment right to confront the witnesses against him. The government filed a motion to alter or amend this judgment; the motion was denied.

I

The parties agree that the trial judge may limit the scope of cross-examination provided that the limitations do not prevent the defendant from effectively confronting the witnesses against him. *Chipman* v. *Mercer*, 628 F.2d 528, 531 (9th Cir. 1980). They disagree as to whether the trial court's restriction of Scarpelli's cross-examination of Culen was so extensive that it abridged Scarpelli's sixth amendment right to confront the witnesses against him. They also disagree as to what remedy is appropriate if, in fact, the trial court erred.

Constitutional error is not always harmful error. Only those errors which affect the defendant's substantial rights require reversal. Errors that have little, if any, effect on the defendant's conviction do not. *Chapman* v. *California*, 386 U.S. 18, 22 (1967). In determining whether a constitutional error is harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. Thus, we must decide whether restriction of the cross-examination of a crucial witness can ever, as a matter of law, be harmless beyond a reasonable doubt.

The district court held that any restriction on the cross-examination of a crucial witness is automatically harmful error in situations where (1) the witness' testimony is absolutely crucial to the defendant's conviction; and (2) the imposed restrictions rendered the defendant's cross-examination of that witness totally ineffective. *United States ex rel. Scarpelli* v. *George*, No. 81 C 864, slip op. at 7-8 (N.D. Ill. Oct. 30, 1981). Applying this harmful error per se rule to Scarpelli's case, the district court concluded that both factors were present because Culen was indisputably the prosecution's principal witness and Scarpelli's proffered questions relating to Culen's trial preparation and prior inconsistent statements were so relevant that failing to permit this line of inquiry effectively prevented any cross-examination relating to Culen's trustworthiness and reliability.

In adopting this per se error rule, the district court principally relied on *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Smith* v. *State of Illinois*, 390 U.S. 129 (1968); and *Chipman* v. *Mercer*, 628 F.2d 528 (9th Cir. 1980). Neither *Davis* nor *Smith* support an automatic reversal rule, and to the extent that *Chipman* does, we decline to adopt its rationale.

In *Davis* the petitioner challenged his state court conviction on the ground that the trial court violated his right to confront the witness against him by prohibiting him from questioning the prosecution's key witness about the witness' prior juvenile record and his probation status. The Supreme Court held that the petitioner had been denied a fair trial because the trial court's ruling prevented him from adequately exposing the jury to facts from which it might infer that the witness was unreliable. It further held that the restriction violated Davis' sixth amendment right of confrontation by preventing him from probing into any bias or prejudice which might have caused the witness to fabricate his identification testimony. The *Davis* Court, however, did not discuss the per se error rule or use language suggesting that this rule is the appropriate standard of review. *Davis* merely held that it is reversible error to restrict cross-examination when that restriction prevents the defendant from attempting to discredit the witness' accuracy and truthfulness. *Davis* v. *Alaska,* 415 U.S. 308, 317-18 (1974).

Similarly, the *Smith* Court did not adopt a per se error rule. In *Smith* the trial court refused to permit the petitioner to ask the principal prosecution witness his name or address. The Court held that this restriction was unconstitutional becuse the very starting point in probing a witness' credibility "must necessarily be to ask the witness who he is and where he lives" and that "to forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right to cross-examination itself." 390 U.S. at 131. This holding was based on the Court's conclusion that the defendant was prejudiced; the Court did not apply a per se error rule.

The Ninth Circuit in *Chipman* v. *Mercer*, 628 F.2d 528 (9th Cir. 1980), specifically stated that any infringement of a defendant's right of confrontation is harmful error per se. *Id.* at 533. Despite this explicit statement, the language of the decision suggests that the court was actually applying the *Chapman* harmless error doctrine, for it stated that "the denial of cross-examination for bias or prejudice *in this case* violated the confrontation clause." *Id.* (emphasis added). Moreover, the *Chipman* court relied on other Ninth Circuit decisions applying the harmless error beyond a reasonable doubt standard, which it did not overrule. This suggests that, while the decision speaks in terms of harmful error per se, the court, in fact, applied a less stringent standard.

We are mindful that cross-examination is the cornerstone of the criminal trial process, *United States* v. *Leach*, 613 F.2d 1295 (5th Cir. 1980), and that the defendant must be given wide latitude to explore a witness' story, to test the witness' perceptions and memory and to impeach his credibility. *United States* v. *Williams*, 592 F.2d 1277 (5th Cir. 1979). We also recognize that the right to cross-examine an adverse witness is not absolute and that the trial judge has considerable discretion to place restrictions on the scope of cross-examination once the right to confront witnesses has been substantially exercised. *United States* v. *West*, 670 F.2d 675 (7th Cir. 1982). *Accord*, *United States* v. *Miranda-Uriarte*, 649 F.2d 1345 (9th Cir. 1981); *United States* v. *Winley*, 638 F.2d 560 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1472 (1982); *Greene* v. *Wainwright*, 634 F.2d 272 (5th Cir. 1981). Adoption of a per se rule would eliminate the trial judge's discretion, making it impossible to expedite the litigation or prevent the introduction of collateral issues which might distract the

jury. The per se error rule would give defense counsel unrestricted license during cross-examination to ask endless, repetitive or irrelevant questions which might confuse the jury as well as unproductively prolong the litigation. Ultimately the criminal process would be hindered. Accordingly, we decline to embrace the per se error rule even in the narrow context suggested by the district court.

II

The next consideration is whether Scarpelli was denied a fair trial because his questioning of Culen was restricted. Relying on *Sumner* v. *Mata*, 449 U.S. 539 (1981), Scarpelli contends that we must accept the state appellate court's finding that Scarpelli was denied his right of confrontation. Assuming *arguendo* that we may determine *de novo* whether his right was violated, Scarpelli argues that the record establishes that the trial court improperly restricted his cross-examination of Culen and that the court's error was not harmless error beyond a reasonable doubt. None of these arguments are persuasive.

Scarpelli's reliance on *Sumner* v. *Mata*, 449 U.S. 539 (1981), to support his argument that we must accept the state appellate court's finding that Scarpelli was denied the right to confront the witnesses against him is misplaced. In *Mata*, the issue was whether the federal habeas court could overrule a factual determination made by a state court. The Supreme Court held that while state factual findings were entitled to a "presumption of correctness," these findings could be overturned when they were not fairly supported by the record and the habeas court explicitly stated the reasoning by which it concluded that the state findings were erroneous. 449 U.S. at 550. The state court's finding that Scarpelli's sixth amendment

right was violated is a mixed question of law and fact, and, consequently, *Mata* does not preclude us from determining *de novo* whether Scarpelli was denied his constitutional rights.

The trial court sustained objections to Scarpelli's questions to Culen concerning (1) inconsistencies between Culen's trial testimony, and his initial police report, preliminary hearing testimony and suppression hearing testimony; (2) whether Culen used police reports or had conversations with the State's Attorney in preparation for his trial appearance; and (3) Culen's recollection of the height of the alleged offender whom he subsequently identified as Scarpelli.

Both the state appellate court and the district court agreed that the questions concerning the nature and credibility of Culen's identification of Scarpelli was a legitimate area for cross-examination. They also agreed that the trial court unduly restricted Scarpelli from attempting to impeach Culen's identification testimony by introducing Culen's prior inconsistent statements relating to the height of the alleged offender. Culen testified at trial that Scarpelli was 5'9". Defense counsel then attempted to introduce Culen's previous statement that the offender was between 5'6" and 5'10" tall. The state appellate court concluded that because the alleged inconsistent statements dealt wtih a slight discrepancy in Culen's testimony, the error in restricting questions on this subject "could not possibly be of such magnitude as to require reversal." *People* v. *Scarpelli*, 82 Ill. App. 3d 689, 697, 402 N.E.2d 915, 922 (2d Dist. 1980), *cert. denied*, 450 U.S. 915 (1981). In contrast, the district court considered the restrictions concerning questions about Culen's identification testimony of Scarpelli in conjunction with the restrictions con-

cerning prior inconsistent statements and the extent to which Culen had prepared for his trial appearance. Applying the per se error rule, it concluded that "the totality of these rulings . . . effectively denied petitioner his constitutional right to confront an adverse winess." *United States ex rel. Gerald Scarpelli* v. *Richard George*, No. 81 C 864, slip op. at 3 (N.D. Ill. Sept. 30, 1981).

We agree with the state appellate court that the discrepancy between the two statements was slight. Moreover, there was other sufficient evidence supporting Scarpelli's conviction. The record establishes that Culen was the investigating officer surveilling a parking lot where several automobile thefts had occurred. The parking lot was well lit with vapor lights. Culen saw a car with two men drive into the lot and cruise up and down the lanes, passing several empty parking places. The car stopped a few spaces away from a 1975 Chevrolet Monte Carlo and one of the men emerged carrying a small black bag close to his body. He walked to the Monte Carlo, got inside, and started the car. As he began to back the Monte Carlo out of the space, Culen drove up behind the Monte Carlo, blocking its path, and got out of his car. When Culen was about fifteen feet from the Monte Carlo, he identified himself as a police officer and ordered the driver to freeze. Instead, the driver rushed out of the car and began to run away. Culen pursued him until he was apprehended. The man apprehended was Scarpelli. Culen also identified Scarpelli in court as the person who was in the Monte Carlo. Under these circumstances, where Scarpelli was apprehended at the scene of the crime rather than some time later on the basis of Culen's description, we agree with the state appellate court that "no reasonable doubt exists that the restriction of the defendant's cross-exami-

nation . . . [of Culen] . . . could have influenced the jury's determination of guilt." *People* v. *Scarpelli*, 82 Ill. App. 3d 689, 697, 402 N.E.2d 915, 923 (2d Dist. 1980), *cert. denied*, 450 U.S. 915 (1981). Accordingly, any error in not permitting unlimited cross-examination of Culen was harmless beyond a reasonable doubt.

Scarpelli raises a myriad of other errors relating to Culen's cross-examination. Appellee's br. at 6. One of his chief complaints is that the trial court repeatedly refused to allow him to attempt to impeach Culen with other prior inconsistent statements. The state appellate court concluded that "with reference to the alleged prior inconsistent statements, the judge's rulings were correct, since either no inconsistency was shown or the question dealt with an immaterial matter." *Id.* at 696, 402 N.E.2d at 922. We agree. Scarpelli's other claims that the district court improperly restricted his cross-examination of Culen are eqaully unavailing.

We have carefully reviewed all of Scarpelli's arguments and conclude that the only error was the trial court's failure to permit Scarpelli to cross-examine Culen concerning his identification testimony. In light of the other evidence against Scarpelli, the error was harmless beyond a reasonable doubt. Accordingly, the district court order granting the writ of habeas corpus is

REVERSED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1982

Before

Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. John L. Coffey, Circuit Judge

UNITED STATES OF AMERICA ex rel.
GERALD SCARPELLI,

Petitioner-Appellee,

No. 81-2806 vs.

RICHARD GEORGE,

Respondent, Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 C 864

Susan Getzendanner, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Petitioner-Appellee Gerald Scarpelli, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Getzendanner

Cause No. 81C864 Date Oct. 30, 1981

Title of Cause—U.S. ex rel Gerald Scarpelli -v- Richard George

Brief Statement of Motion — Memorandum Opinion and Order

Enter Memorandum Opinion And Order: "Respondent's motion to alter or amend judgment and Findings of the Court is therefore denied. Petitioner's motion for bail is granted." (Draft)

/s/ Getzendanner, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. Gerald Scarpelli, Petitioner,	)	
v.	)	No. 81 C 864
RICHARD GEORGE, Respondent.	)	

MEMORANDUM OPINION AND ORDER

Susan Getzendanner
United States District Judge

On September 30, 1981, I issued a Memorandum Opinion and Order granting petitioner Gerald Scarpelli a writ of

habeas corpus. By later amendment I stayed this order and held that the writ would issue on October 30 if no retrial proceedings were commenced by that date. Now before the Court is the state's motion for reconsideration of the initial decision in favor of petitioner. For the reasons to follow, this motion is denied.

The September 30 opinion fully sets forth the background facts. In essence, I there held that the state trial judge had unconstitutionally limited petitioner's attempt to cross-examine arresting Officer Culen, the state's chief witness. I further held that errors of this sort are per se grounds for reversal and that the petition for habeas corpus was accordingly meritorious. As I read the state's motion for reconsideration, the initial half of this ruling is no longer in dispute. The state seems to have conceded that "[t]he totality of [the state trial judge's evidentiary] rulings . . . effectively denied petitioner his constitutional right to confront an adverse witness." *United States ex rel. Scarpelli* v. *George,* No. 81 C 864 (N.D. Ill. Sept. 30, 1981), slip op. at 3.* Rather, the state has concentrated its attack on my conclusion that the error in question constituted per se grounds for reversal. It argues that the "harmless error" rule of *Chapman* v. *California,* 386 U.S. 18 (1967), is the appropriate standard of review, and that, judged by this norm, the petition for habeas corpus must be denied.

In deciding this issue, it must be strictly borne in mind that the testimony offered by Officer Culen was absolutely

---

* On direct appeal, the Illinois Appellate Court also found that the trial judge's actions were improper. *People* v. *Scarpelli,* 82 Ill. App. 3d 689, 696, 402 N.E.2d 915, 922 (2d Dist. 1980). The Court's determination, however, seems not to have ben based on the confrontation clause, but rather on various doctrines of state law.

"crucial" to the successful prosecution of petitioner.* For, fairly read, the case law establishes that whenever a criminal defendant is denied the right to cross-examine effectively the state's "chief" or "principal" witness, such error can never be deemed harmless. *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974); *Smith* v. *State of Illinois*, 390 U.S. 129, 131 (1968); *Chipman* v. *Mercer*, 628 F.2d 528, 533 (9th Cir. 1980).** For example, in *Davis*, the defendant was denied an opportunity to cross-examine fully the state's "crucial witness." *Davis* v. *Alaska*, *supra*, 415 U.S. at 310. Underscoring this latter point, the Supreme Court further noted that "[t]he accuracy and truthfulness of [the witness'] testimony were key elements in the State's case against petitioner." *Id.* at 317. The confrontation clause deprivation suffered by defendant, the Court thus held, was "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* at 318. Similarly, in *Smith*, *per se* error was found to adhere in the trial judge's rulings which barred the defendant from questioning the state's "principal witness" about his real name and address. *Smith* v. *State of Illinois*, *supra*, 390 U.S. at 130-1

No case cited by the state establishes any contrary rule. In several of them, to be sure, confrontation clause errors were held to be harmless. But no such case concerned a defendant's right to cross-examine a witness who pro-

---

* The Illinois Appellate Court recognized that Culen was "the State's chief witness" *People* v. *Scarpelli*, *supra*, 82 Ill. App. 3d at 690, 402 N.E.2d at 918.

** In one decision the Ninth Circuit has even extended the per se rule to a case in which the constitutional challenge concerned the defendant's right to confront a non-crucial witness. *United States* v. *Willis*, 647 F.2d 54, 58 (9th Cir. 1981).

vided testimony absolutely necessary for the conviction. In *Schneble* v. *Florida*, 405 U.S. 427 (1972), the trial judge admitted into evidence a hearsay statement made by the defendant's co-conspirator. The statement implicated the defendant and the co-conspirators were tried jointly. Therefore, the trial judge's ruling unconstitutionally denied the defendant his right to cross-examine the adverse deponent (the co-conspirator). *See Bruton* v. *United States*, 391 U.S. 123 (1968). In finding this error "harmless," Justice Rehnquist emphasized that the jury could have rationally voted to convict even if it had never learned of the co-conspirator's statements. The defendant's own confession had provided "independent evidence" of an "overwhelming" nature. *Schneble* v. *Florida*, *supra*, 405 U.S. at 431. Justice Rehnquist thus impliedly held that even if the defendant had been allowed to cross-examine the co-conspirator and even if this cross-examination had completely destroyed the latter's credibility, a conviction would still have been warranted.*

United States v. *Friedman*, 593 F.2d 109 (9th Cir. 1979) and *United States* v. *Price*, 577 F.2d 1356 (9th Cir. 1978) are to like effect. In both cases the defendant had attempted to cross-examine a given witness; in both cases, these efforts had been frustrated by the trial judge's evidentiary rulings. And, most importantly, in both cases, the Ninth Circuit further found that the witness' testimony had been essentially cumulative and unnecessary. The remaining evidence of the defendant's guilt was

---

* The dissenters disputed Justice Rehnquist's evaluation of the strength of the state's "independent evidence." *Schneble* v. *Florida*, 405 U.S. 427, 432 (opinion of Marshall, J.). The fact remains, however, that the majority viewed the record in the manner described in the text.

deemed, as in *Schneble,* "overwhelming." *United States* v. *Friedman, supra,* 593 F.2d at 121; *United States* v. *Price,* 577 F.2d at 1362.

The D.C. Circuit's opinion in *United States* v. *Pugh,* 436 F.2d 222 (D.C. Cir. 1970) seems at first glance to be inconsistent with this analysis. There, the Court held that an improper restriction on the defendant's right to cross-examine "a key government [eye]witness" had been harmless. *Id.* at 223. Yet, despite this choice of adjective, it is clear that the testimony offered by this eyewitness had not been "crucial" in the sense used here. For a second eyewitness had provided essentially identical testimony implicating the defendant. *Id.* at 226. Thus, as in the previous cases, a conviction would still have been warranted even if the defendant's attempted cross-examination had completely neutralized the first witness' testimony.

The remaining cases cited by the respondent are distinguishable on an even more basic level. In none of them was there ever made an initial finding of confrontation clause violation. The question presented in *United States* v. *Kearney,* 420 F.2d 170 (D.C. Cir. 1969) and *United States* v. *Kizer,* 569 F.2d 504 (9th Cir. 1978), was whether the defendant had a right to cross-examine a state witness about that witness' alleged drug abuse. While conceding that these questions were pertinent and otherwise proper, the Appellate Courts further noted that such questions were fraught with dangers of prejudice. Accordingly, they upheld the restrictions imposed by the trial judge on the defendant's right to enter into this line of questioning. *See generally United States* v. *Knight,* 509 F.2d 354, 357 (D.C.Cir. 1974); *United States* v. *Fowler,* 465 F.2d 664 (D.C. Cir. 1972). The very most that can be gleaned from

these decisions is, therefore, a holding that, like other constitutional rights, a defendant's right to cross-examine an adverse witness is not absolute. It can be curtailed when the restriction is needed to effectuate other equally compelling social policies. *See generally Davis* v. *Alaska, supra.* These cases say very little, if anything, about what should be the appropriate remedy, once it is determined that the defendant's rights have indeed been abridged.*

Respondent lastly cited *United States* v. *Duhon*, 565 F.2d 345 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978). There, a defendant challenged his trial judge's restrictions on his attempt to question the state's key witness. The proposed inquiries concerned the witness' hearing ability and an alleged prior inconsistent statement. The Fifth Circuit rejected the latter claim, holding that the issue of the alleged inconsistency had been "fully aired before the jury." *Id.* at 354. As to the former claim, however, the Court of Appeals agreed that the trial judge had acted improperly. Most importantly, though, the Court did not hold that the defendant had thereby suffered a loss of a constitutional right. Apparently the Court viewed the defendant's proposed inquiry as too peripheral to be constitutionally guaranteed. *Accord, Chipman* v. *Mercer*, 628 F.2d 528, 533 (9th Cir. 1980) ("a confrontation clause violation generally does not occur unless the denied area of cross-examination is one of considerable relevance"). Thus, unlike the pres-

---

* In dictum, the *Kizer* court did say that even if an error had occurred, it had been harmless. Significantly, however, the court also added that "Nelson's testimony was largely cumulative and the Government introduced abundant independent evidence of Kizer's guilt." *United States* v. *Kizer*, 569 F.2d 504, 506 (9th Cir. 1978). Therefore, to the extent that *Kizer* is relevant at all to the question of remedy, it is completely consistent with *Davis, Smith, Schneble, Friedman, Price* and *Pugh*.

ent case, in *Duhon* there was never made an initial finding of constitutional violation.

In sum, the per se rule upon which I rely is narrow. It applies only if the defendant can establish two predicate factors, namely, (1) that the witness he attempted to cross-examine provided testimony absolutely "crucial" to his conviction, and (2) that the restriction imposed by the trial judge rendered "ineffective" whatever cross-examination was allowed. Thus, the per se rule will not apply if the witness' testimony was so unnecessary or cumulative that a conviction would have been warranted even if the defendant had succeeded in completely destroying the witness' credibility. Nor will it apply if the trial judge's rulings merely prevented the defendant from asking questions which were either repetitious or of marginal relevance.

In this case, the two predicate factors were undoubtedly present. Officer Culen was certainly a "crucial" witness within the meaning ascribed above. The state's case rested almost entirely on his claim that he had observed petitioner commit the challenged offense. Moreover, the petitioner's attempted inquiries—into Officer Culen's trial preparation and prior inconsistent statements—were highly relevant. In barring them, the trial judge thus prevented petitioner from "effectively" challenging his primary accuser. As I held before, "confrontation clause errors *of this sort* are . . . per se grounds for reversal . . . ." *United States ex rel. Scarpelli* v. *George*, *supra*, slip op. at 4 (emphasis added).

Such a result is, I believe, quite sensible. For whenever a criminal defendant is denied an ample opportunity to question the state's primary witness, the danger of prejudice is obviously great. In asking that I deem the trial

judge's errors "harmless," respondent is essentially arguing that these dangers are only presumptively large, and that the state should be allowed an opportunity to rebut this inference. Two factors counsel against such an approach. First of all, since the primary witness has, by definition, been excused from answering the defendant's questions, there is absolutely no way to know with certainty exactly how he would have responded. Therefore, in order to hold that errors of this sort were harmless beyond a reasonable doubt, a court would of necessity have to engage in an intolerable amount of initial speculation.* Moreover, even if it were somehow possible to divine how the witness would have responded, and even if it were somehow possible for a reviewing court to make an informed judgment as to credibility on the basis of the paper record it had created, such a procedure would not allot a criminal defendant his due. For if the Sixth Amendment's guarantee of trial by jury has any meaning, it would seem to accord each defendant the right to have *his peers* assess the credibility of his primary accuser on the basis of all relevant evidence. Trial by reviewing court is no substitute:

> We cannot speculate as to whether the jury as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.''

Davis v. *Alaska*, *supra*, 415 U.S. at 317 (citation omitted).

---

* By contrast, when a witness is not "crucial" as defined above, a court can hold for the state even if it assumes *arguendo* that no rational juror could have credited the witness' testimony.

Respondent's Motion to Alter or Amend Judgment and Findings of the Court is therefore denied. Petitioner's Motion for Bail is granted.

/s/ *Susan Getzendanner*
Susan Getzendanner
United States District Judge

Dated: October 30, 1981

APPENDIX D

Name of Presiding Judge. Honorable Getzendanner
Cause No. 81 C 864 Date Sept. 30, 1981

Title of Cause—U.S. ex rel Scarpelli v. George

Brief Statement of Motion — Memorandum Opinion and Order

ENTER MEMORANDUM OPINION AND ORDER: "Accordingly, the court orders that the petitioner's petition for writ of habeas corpus be granted and that he be released." (DRAFT)

/s/ Getzendanner, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States ex rel. Gerald Scarpelli, Petitioner,	)	
v.	)	No. 81 C 864
Richard George, Respondent.	)	

Memorandum Opinion
and Order

This habeas corpus action is before the court on petitioner's motion for summary judgment. Petitioner argues that his prior state conviction must be set aside on the ground that the state trial judge improperly limited peti-

tioner's attempt to cross examine the state's chief witness.* I agree.

The pertinent facts are relatively simple. On February 8, 1977, petitioner was arrested for auto theft and possession of burglary tools. Trial was held in July of 1979. The state's primary witness was Clyde E. Culen, a police officer who claimed to have witnessed petitioner commit the above crimes. Petitioner's counsel attempted to test Culen's credibility, but numerous inquiries were thwarted when the state court trial judge sustained evidentiary objections. The jury subsequently returned guilty verdicts on both counts. The defendant was sentenced. On appeal, the Illinois Appellate Court sustained the convictions. *People* v. *Scarpelli*, 82 Ill. App. 3d 689, 402 N.E.2d 915 (2d. Dist. 1980). Petitioner's Petition for Leave to Appeal was denied by the Illinois Supreme Court and the United States Supreme Court refused to grant a writ of certiorari.

The Illinois Appellate Court agreed with petitioner's claim that his right to cross examine Officer Culen had been abridged. Specifically the Court found error in the trial court's rulings which denied petitioner the opportunity to explore an apparent inconsistency between Culen's trial and preliminary hearing testimony. At the preliminary hearing Culen had testified that the height of the suspect he had viewed committing the alleged theft was between 5'6" and 5'10". Two years later at the trial Culen testified that the thief was "definitely" no more

---

* A defendant's right to cross examine prosecution witnesses derives from the Sixth Amendment's Confrontation Clause. *Pointer* v. *Texas*, 380 U.S. 400, 401 (1965). This right has been incorporated into the guarantees of the Fourteenth Amendment's Due Process Clause. *Id.* at 403.

than 5'9". Trial Transcript at 200. The trial court had previously ruled that the noted discrepancy was so inconsequential that it was a completely improper basis for impeachment.

Like the Illinois Appellate Court, I cannot agree with the state trial court judge. The subject matter of the petitioner's inquiry was not so tangential that it was excludable under the "collateral matters" doctrine. The Illinois Appellate Court's determination of error, in this court's opinion, was correct.

Moreover, the discrepancy noted by the Appellate Court was not unique. On numerous additional occasions the trial judge similarly barred exploration of inconsistencies between Officer Culen's trial testimony and his initial police report, preliminary hearing testimony, and suppression hearing testimony. See generally pages 214, 225, 234, 193-95, 204, 213, 216, 210, 212 and 124-25 of the Trial Transcript. Barred as well were inquiries into the extent to which Officer Culen had prepared for his trial appearance. The totality of these rulings, I believe, effectively denied petitioner his constitutional right to confront an adverse witness. Much less egregious deprivations have already been held to be unconstitutional. See *Smith* v. *State of Illinois,* 390 U.S. 129 (1968).

The Appellate Court nevertheless affirmed petitioner's conviction on the ground that the trial court's errors had been "harmless." *People* v. *Scarpelli, supra,* 402 N.E.2d at 922. This analysis is at variance with the Supreme Court's repeated admonition that:

> If there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.

Brookhart v. *Janis*, 384 U.S. 1, 3 (1966); *accord*, *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974); *Smith* v. *State of Illinois*, *supra*, 390 U.S. at 131. Confrontation Clause errors of this sort are thus per se grounds for reversal and petitioner is entitled to a writ of habeas corpus.

Accordingly, the court orders that the petitioner's petition for writ of habeas corpus be granted and that he be released.

/s/ *Susan Getzendanner*
Susan Getzendanner
United States District Court Judge

September 30, 1981.